Supreme Court, U.S.
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No. 99-196

IN THE
Supreme Court of the United States

ANR COAL COMPANY, INC.,
Petitioner,

v.

COGENTRIX OF NORTH CAROLINA, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Court of Appeals correctly hold that an arbitrator's nondisclosure of "trivial" matters did not violate the procedural rules governing the arbitration, nor establish "evident partiality" within the meaning of 9 U.S.C. § 10(a)(2)?

LIST PURSUANT TO RULE 29.6

Respondent is not a publicly-held corporation. Respondent is an indirectly wholly-owned subsidiary of Cogentrix Energy, Inc., which is not a publicly-held corporation. No publicly-held company owns 10% or more of respondent's stock.

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BRIEF IN OPPOSITION

STATEMENT

Petitioner through its predecessor in interest contracted in 1986 to supply coal requirements for ten years to respondent, a company generating and selling electricity. In the tenth year of the contract a dispute arose as to the amount of coal respondent was required to purchase. Petitioner filed a demand for arbitration with the American Arbitration Association (AAA), pursuant to a provision of the contract that non-price disputes "shall be submitted to arbitration under the Commercial Arbitration Rules of the American Arbitration Association" and that "[t]he award of the arbitrators shall be conclusive and binding upon the parties and shall be specifically enforceable by any court having jurisdiction over either party by

the entry of judgment upon the award." C.A. App. 73.[1] Each party was permitted to pick one of a panel of three arbitrators, with the third or "neutral" arbitrator to be selected by the other two arbitrators from a list of candidates provided by the AAA.

A. Disclosures by the Neutral Arbitrator.

In accordance with its Commercial Arbitration Rules, the AAA provided the two parties with a list of candidates for neutral arbitrator, accompanied with brief curricula vitae as to each. One of those on the final list was Wilburn Brewer, Jr., of the Columbia, South Carolina firm of Nexsen Pruet Jacobs & Pollard, LLP. Prior to his selection, in response to an objection from petitioner that he and another candidate should be removed from the list because they had represented power companies, the AAA denied the objection, explaining to the parties:

> "I was advised by Mr. Brewer that he has never personally represented Duke Power or CP&L. Mr. Brewer is aware that his firm does a few workers comp cases for Duke Power and any electrocution cases for CP&L, which are sporadically filed."

C.A. App. 128.[2]

After the parties exercised their peremptory challenges, Mr. Brewer received the highest combined ranking by the two parties of the candidates remaining, and in January

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[1] Citations to "C.A. App." are to the appendix filed in the Court of Appeals; to "Pet." to the petition for certiorari; and to "P.C.A." to the appendix to the petition.

[2] Carolina Power & Light (CP&L) was the principal electricity customer of respondent and a potential witness, but was not a party to the arbitration. Two candidates on the original list had been deleted by the AAA based on their being CP&L's general counsel and former associate counsel; a third was removed because his law firm had filed a suit against respondent.

1997 was selected neutral arbitrator. Under AAA Commercial Arbitration Rule 19, upon being selected he was required to disclose "any circumstance likely to affect impartiality," and any party thereupon could object to his serving. Upon selection he accordingly disclosed that ten years earlier

> "In 1987, his firm merged with Moore & Van Allen [counsel for respondent] and then separated in 1988. During 1988, Mr. Brewer was ill with leukemia and not actively practicing law or involved with the firm. Through this temporary merger, Mr. Brewer knows Mr. Davis [counsel for respondent]."

C.A. App. 130. Although specifically invited by the AAA to challenge him for cause, *id.*, petitioner declined to do so, *id.* 131. Later the same month Mr. Brewer submitted as a further disclosure a signed statement that:

> "I understand that somehow Duke Power Company and/or Carolina Power and Light Company may be remotely connected with this matter. Other lawyers in my firm have represented CP&L in electrocution cases in South Carolina, and other lawyers in my firm have represented Duke Power Company in workers' compensation cases and in tax cases in South Carolina. I have not personally represented either company. All of our clients are important, but neither of these companies are dominant clients in our firm.
>
> "In 1987, Nexsen Pruet Jacobs & Pollard [Mr. Brewer's firm] merged with Moore and Van Allen of North Carolina [counsel for respondent]. The merger lasted approximately one year, and the entire Nexsen Pruet firm withdrew and reconstituted its practice as Nexsen Pruet. During most of that time, I was ill with leukemia and not actively practicing. As a

result of that relationship, I know Jeff Davis who represents Cogentrix.

"I am confident that neither of the above disclosures would in any way affect my impartiality or ability to fairly arbitrate this matter. I am not aware of any other matters which should be disclosed."

Id. 134. Again, petitioner was invited to object, but declined. *Id.* 133. Petitioner's counsel later explained:

"Given there was no assurance that the challenge would be granted and that a failed challenge could potentially offend the 'neutral' arbitrator as a challenge to his integrity, ANR believed it risky to make the challenge."

Id. 36; see also *id.* 53 n.10; *id.* 152.

After hearing testimony and receiving documentary evidence, the panel of arbitrators ruled 2-1 in favor of respondent, wtih Mr. Brewer in the majority.

B. Petitioner's Complaint.

After losing the arbitration, petitioner filed a civil action in the United States District Court for the Western District of North Carolina praying to have the award vacated.[3] Respondent moved to have the award confirmed. Petitioner stated that at some undisclosed time it had learned of additional matters it argued Mr. Brewer should have disclosed, and urged that his failure to have done so required vacating the arbitration ruling. These were:

1. During the brief unsuccessful merger ten years previously between Mr. Brewer's firm and respondent's

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[3] The Court of Appeals held that under the statute, 9 U.S.C. § 12, "ANR clearly erred by labeling its pleading a civil complaint, rather than a motion to vacate," but that the error was not prejudicial. P.C.A. 5 n.1.

(which had been disclosed), while Mr. Brewer was ill with leukemia and not practicing, some of the latter firm's attorneys held warrants to purchase respondent's stock, and the merged firm had represented respondent.

2. In addition to electrocution cases (which had been disclosed), petitioner now cited two cases reported respectively in 1994 and 1996 involving service disputes in which Mr. Brewer's firm (but not Mr. Brewer personally) had represented Carolina Power & Light.

Petitioner did not allege that Mr. Brewer had been aware of these facts.[4] Nor did petitioner explain why it "first became aware of," C.A. App. 157, the two previously-reported non-electrocution cases only after losing the arbitration.

C. The District Court's Decision.

By consent of the parties, petitioner's complaint was submitted for decision to a magistrate judge. Without any hearings or oral argument, the magistrate issued an opinion vacating the arbitration decision on the ground that the record established "evident partiality" by Mr. Brewer within the meaning of 9 U.S.C. § 10(a)(2). P.C.A. 27.

The magistrate judge based his ruling on what he called "Mr. Brewer's duty to disclose *all* information regarding his present and past relations with Cogentrix and other potentially interested parties." *Id.* 26 (emphasis supplied). Mr. Brewer violated that duty, the magistrate judge said, by not disclosing what the magistrate judge characterized as "details," *id.*: warrants held ten years previously by some lawyers during the brief law-firm merger, representation of respondent during the merger, and the two reported non-electrocution cases. The magistrate

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[4] Mr. Brewer's statement in his disclosure memorandum that "I am not aware of any other matters which should be disclosed," C.A. App. 134, was not contradicted.

judge reasoned that had petitioner known these additional facts, it might have exercised its peremptory challenges differently or ranked the candidates differently. *Id.* 27. He did not address specifically AAA Rule 19, which requires disclosure of potential conflicts only *after* peremptory challenges and rankings have been completed and a candidate selected. Respondent appealed.

D. The Court of Appeals' Decision.

On appeal, the Fourth Circuit reversed, in an opinion by Judge Motz, joined by Judges Ervin and Traxler. The Court of Appeals held that the magistrate judge had erred in concluding that 9 U.S.C. § 10(a)(2) imposed a duty on arbitrators to disclose "all information," however outdated or trivial. The Court of Appeals held that "evident partiality" under 9 U.S.C. § 10(a)(2) was not established by "[f]ailure to disclose the sort of attenuated, nonsubstantial relationships at issue here." P.C.A. 9.

The Court of Appeals also rejected petitioner's argument that the AAA Commercial Arbitration Rules had been violated and that such violation required reversal. Failure to disclose such insubstantial matters, it held, did not violate AAA Rule 19. Moreover, the standard for judicial reversal, the court explained, was not the AAA rules, but rather the statutory one of "evident partiality."

The Court of Appeals then engaged in a detailed examination of the additional facts petitioner argued were required to have been disclosed. Applying an established four-factor test,[5] the court concluded that as to the existence of two non-electrocution cases, (1) no personal interest of Mr. Brewer in the arbitration had been shown; (2) he had no direct relationship with the parties or the

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[5] See, *e.g.*, *Consolidation Coal Co.* v. *Local 1643*, 48 F.3d 125, 130 (4th Cir. 1995).

arbitration; and (3) "the 'connection' between Brewer and Cogentrix is virtually nonexistent," and that therefore (4) proximity in time was "of little significance." P.C.A. 14. As to the merged firm's representation of Cogentrix in 1988 and the warrants held personally by some lawyers, the court reached the same conclusion as to the first two factors, noted that there was a "remote" connection to a party to the arbitration, but that "it is difficult to understand how the facts of this case demonstrate any 'personal interest' on Brewer's part, let alone one that is direct and proximate in time to the arbitration." *Id.* 15. Summarizing the record, the Court of Appeals held:

> "ANR has not carried its burden of proffering facts that, alone or taken together, would permit a reasonable person to assume that Brewer was partial to Cogentrix. A trivial relationship, even if undisclosed, will not justify vacatur of an arbitration award."

Id. 15-16. Rehearing and rehearing *en banc* were denied. *Id.* 29.

REASONS FOR DENYING THE WRIT

The petition's principal argument is that any noncompliance with the disclosure rules governing an arbitration should *per se* require a federal district court to vacate the arbitration award. Pet. 10, 12. Even if that proposition were correct—which it is not—it has no application to this case. For, as the Court of Appeals explained, the "trivial" matters complained of here were so insubstantial that the AAA Rules did not require their disclosure. Thus the initial premise of the petition—that a disclosure rule was violated here—is simply incorrect.

Moreover, as the Court of Appeals also correctly ruled, judicial authority to vacate an arbitration award must be found in 9 U.S.C. § 10(a). In this case, where the arbi-

trator made extensive disclosures, the failure to include insignificant additional facts (of which there was no evidence the arbitrator had even been aware) did not remotely meet the statutory standard of "evident partiality" under 9 U.S.C. § 10(a)(2), which was the authority relied on by the magistrate judge to vacate the arbitration award.

The Fourth Circuit's well-reasoned analysis of the record and of the governing statute and case law fully explains why the magistrate judge's ruling that "evident partiality" had been established was in error. The Fourth Circuit's opinion applies well-settled principles to a particular set of facts. It makes no new law, and is fully in accord with decisions of this Court and of other federal circuits.

I. THE COURT OF APPEALS CORRECTLY HELD THAT THERE WAS NO VIOLATION OF 9 U.S.C. § 10(a)(2) NOR OF THE APPLICABLE ARBITRATION RULES.

Petitioner argues that noncompliance with the procedural rules governing an arbitration "requires vacation of the resulting arbitration award." Pet. 10 (capitalization omitted). No case has ever so held, and that argument is both mistaken and inapplicable to this case.

1. First of all, the petition's opening assertion—that it is a "fact that the arbitrator in this case was selected in violation of the parties' contractually agreed upon procedures," Pet. 4—is simply incorrect. As the Fourth Circuit explained and emphasized, no violation of the rules governing this arbitration occurred:

> "Failure to disclose the sort of attenuated, nonsubstantial relationships at issue here violates neither the teaching of *Commonwealth Coatings* nor AAA Rule 19."

P.C.A. 9. Because no arbitration rule was violated, petitioner's first argument—that such a violation should require vacating without regard to the standards of 9 U.S.C. § 10—raises a point that is not only unsupported in law, but in this case is entirely hypothetical.

Although the petition repeatedly asserts "violations of the governing AAA procedural rules," Pet. 10, notably it never quotes them. The applicable rule, AAA Commercial Arbitration Rule 19, provides:

> "Any person *appointed* as neutral arbitrator shall disclose to the AAA any circumstance *likely to affect impartiality,* including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others. Upon *objection of a party to the continued service* of a neutral arbitrator, the AAA shall determine whether the arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive."

(Emphasis supplied.) Rule 19 thus does not require, as the magistrate judge (who did not cite the rule) believed, disclosure of "all information regarding his present and past relations." P.C.A. 26. Rather, the rule requires disclosure only of circumstances "likely to affect impartiality." And when the magistrate judge emphasized that nondisclosure prior to selection might have affected petitioner's peremptory challenges, *id.* 26-27, he misunderstood what the rule requires. The text of Rule 19 makes clear that disclosures are not required to be made until *after* the arbitrator is "appointed." At that time parties may raise objections for cause "to the continued service"

of the arbitrator. Oblivious to the language of the rule, petitioner repeatedly complains that had disclosure been made, it might have exercised a peremptory challenge against Mr. Brewer. See Pet. 6 ("ANR would have struck Brewer with one of its peremptory strikes"), 8 ("effect that the inadequate and untimely disclosures had on ANR's right to exercise peremptory strikes"), 9 ("ANR reasonably would have exercised a peremptory challenge"). But all of that is utterly beside the point. Under Rule 19, peremptory challenges come first, then disclosures.[6] While claiming a violation of the AAA rules, petitioner really is complaining about the procedure established by the rules themselves.

2. Secondly, for the reasons the Fourth Circuit carefully set forth, the case is governed by federal statute. The Federal Arbitration Act does not confer on federal district courts a general authority to review arbitration results for error, substantive or procedural. Rather, by statute the judicial role is narrowly circumscribed. Arbitration results may be overturned only on one of four statutorily prescribed grounds:

> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence

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[6] The petition misleads in complaining that at the time peremptory challenges were made, Mr. Brewer "had not disclosed" the brief merger of the two law firms ten years earlier. Pet. 6. As soon as he was appointed and required to make disclosure by Rule 19, the merger was immediately, in fact twice, fully disclosed. C.A. App. 130, 134. Indeed, he and other candidates made some disclosures regarding CP&L in response to specific questions of the AAA even before the rules required. C.A. App. 128.

> pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

Of those four statutory grounds, only the second, "evident partiality," was relied on by the magistrate judge. His ruling was not based upon any evidentiary hearing; it was simply a ruling as a matter of law, entered without even oral argument by counsel. The Fourth Circuit, having examined the same record, had ample reason to conclude that on this record the magistrate judge had misapplied the statute, and that the additional matters the magistrate held should have been disclosed did not establish "evident partiality." The Court of Appeals' analysis of that undisputed record was thorough, reflects common sense, and is surely correct; in any event, no retracing of those details by this Court is required.

II. THERE IS NO CONFLICT WITH DECISIONS OF THIS COURT.

Petitioner claims a conflict with two decisions of this Court which hold that arbitration contracts are to be enforced according to their terms. *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *Volt Information Sciences, Inc.* v. *Board of Trustees*, 489 U.S. 468 (1989). Neither case addressed the "evident partiality" standard prescribed in 9 U.S.C. § 10(a)(2).

Petitioner urges that under *Mastrobuono*, "the Fourth Circuit should have (1) determined the rules the parties' arbitration agreement imposed upon the arbitrator selection process; (2) determined if the rules had been followed;

and (3) if the rules have not been followed, vacated the award . . . ." Pet. 12. But the Fourth Circuit performed exactly such an analysis. It determined (1) that the arbitration agreement incorporated AAA Commercial Arbitration Rule 19; and (2) that on this record no violation of Rule 19 or of the arbitration agreement had occurred. See P.C.A. 6-7, 9. This Court need not review the correctness of that determination.

Petitioner also asserts a conflict with *Commonwealth Coatings Corp.* v. *Continental Cas. Co.*, 393 U.S. 145 (1968). In that case, unlike this one, an arbitrator had failed to disclose what this Court called a "repeated and significant" longstanding business relationship between the arbitrator and one of the parties to the arbitration. 393 U.S. at 146. This Court held that

> "We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another."

Id. at 150. Therefore disclosure should be made of "any dealings that might create an impression of possible bias." *Id.* at 149. In substantially the same formulation, the Fourth Circuit here held:

> "A party need not prove that the arbitrator, in fact, had improper motives. To do so would make the standard for evident partiality equivalent to proving actual bias. . . . But a party seeking vacatur must put forward facts that *objectively* demonstrate such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives."

P.C.A. 12 (emphasis in original). On the facts of this case, it held, "ANR has not carried its burden." *Id.* 15; see *id.* 7-9.

Moreover, the *Commonwealth Coatings* opinion was further explained by Justices White and Marshall, who were essential members of the majority, and who emphasized that an arbitrator "cannot be expected to provide the parties with his complete and unexpurgated business biography." 393 U.S. at 151 (White, J., joined by Marshall, J., concurring).[7] They added—in words exactly fitting the present case—"it will not be difficult for courts to identify those undisclosed relationships which are too insubstantial to warrant vacating an award." *Id.* at 152. The Fourth Circuit here did exactly that: it examined the record, found the undisclosed relationships to be insubstantial, and correctly reinstated the arbitration award.

III. THERE IS NO CONFLICT WITH OTHER CIRCUITS.

Petitioner's assertion of a conflict among the Circuits is fully refuted in the Fourth Circuit's opinion, P.C.A. 10-11, which the petition leaves unaddressed. The Fourth Circuit pointed out that the cases petitioner cites all involved nondisclosures of matters so consequential, as in *Commonwealth Coatings*, that on those facts and the entire records of those cases evident partiality could be inferred. See *Olson* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 F.3d 157 (8th Cir. 1995); *Schmitz* v. *Zilveti*, 20 F.3d 1043 (9th Cir. 1994).[8] These were not, as the petition mistakenly asserts, rulings vacating *per se* simply for arbitrators' non-compliance with disclosure

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[7] The significance of Justice White's opinion in *Commonwealth Coatings* has frequently been noted. See P.C.A. 9 n.3 and cases there cited.

[8] *Rogers* v. *Schering Corp.*, 165 F. Supp. 295 (D.N.J. 1958), *aff'd*, 271 F.2d 266 (3d Cir. 1959), a much earlier district-court opinion, as the Fourth Circuit pointed out involved violation by the AAA of its own rules. See P.C.A. 10.

rules. See Pet. 16. Petitioner has cited no case holding nondisclosure by an arbitrator of such "trivial" facts established "evident partiality" under 9 U.S.C. § 10(a)(2).

CONCLUSION

For the reasons stated, certiorari should be denied.

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